

APPEAL NO. 040173
FILED MARCH 19, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 5, 2004. The hearing officer determined that the respondent's (claimant) _____, compensable injury includes right side radial nerve entrapment; that the claimant is not entitled to supplemental income benefits (SIBs) for the fourth and fifth quarters; and that she is entitled to SIBs for the sixth and seventh quarters. The appellant (carrier) appeals the determinations that the injury includes right side radial nerve entrapment and that the claimant is entitled to SIBs for the sixth and seventh quarters. The appeal file contains no response from the claimant. The determination that the claimant is not entitled to SIBs for the fourth and fifth quarters has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part; reversed and remanded in part.

Extent of injury was a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). Nothing in our review of the record indicates that the hearing officer's determination that the compensable injury includes right side radial nerve entrapment is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Section 408.142 provides that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; and (2) has in good faith sought employment commensurate with his or her ability to work. The carrier's argument that the hearing officer erred in the direct result finding is predicated on the argument that the compensable injury does not include right side radial nerve entrapment. As we have affirmed the hearing officer's extent-of-injury determination, we need not further address the carrier's direct result argument.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) (Rule 130.102(d)(5)) provides that the good faith requirement may be satisfied if the claimant "has provided sufficient documentation as described in subsection (e)." Rule 130.102(e) states that "an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." The rule then lists information to be considered in determining whether the injured employee has

made a good faith effort, including, among other things, the number of jobs applied for, applications which document the job search, the amount of time spent in attempting to find employment, and any job search plan. The hearing officer was persuaded that the claimant's documented job searches made during each week of the seventh quarter qualifying period were made in good faith. We perceive no error in the hearing officer's determination that the claimant is entitled to seventh quarter SIBs.

With regard to the sixth quarter SIBs, the claimant relied on a hybrid theory for entitlement; that she had no ability to work during part of the qualifying period in question and that, in accordance with Rule 130.102(d)(5), she looked for work during each of the remaining weeks of the qualifying period. The hearing officer found that the claimant had no ability to work beginning January 8, 2003, the date upon which she underwent a right radial nerve decompression, and continuing for two weeks thereafter. The evidence reflects that the claimant documented a job search for each week of the sixth quarter qualifying period except for the first week, which was from January 16 through January 22, 2003. Rule 130.102(d)(4) states that the "good faith" criterion will be met if the employee:

has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

In Texas Workers' Compensation Commission Appeal No. 002428, decided December 1, 2000, the Appeals Panel noted that a claimant could satisfy the good faith requirement by demonstrating that he or she had no ability to work for part of the qualifying period and by conducting a good faith job search in the other part of the qualifying period, but that in order to prevail, the claimant must produce evidence that establishes the requirements of Rule 130.102(d)(4) for the period of time that no ability to work was asserted. Because the hearing officer made no findings with regard to two of the three prongs provided in Rule 130.102(d)(4), it is necessary to remand the case for the hearing officer to: (1) determine whether there is a sufficient narrative in evidence and, if so, identify it; and (2) determine whether there are any other records in evidence showing that the claimant had an ability to work during the first week of the sixth quarter qualifying period and if so, identify them. Based on these findings, the hearing officer should decide whether the claimant is entitled to SIBs for the sixth quarter.

Although the carrier asserts that the hearing officer erred in finding that the claimant had no ability to work during the seventh quarter qualifying period (in addition to the sixth quarter qualifying period), the hearing officer made no such finding with regard to the seventh quarter, but instead based his entitlement decision on the claimant's job search efforts.

The determinations that the claimant's compensable injury includes right side radial nerve entrapment and that she is entitled to seventh quarter SIBs are affirmed.

The determination that the claimant is entitled to sixth quarter SIBs is reversed and remanded in order for the hearing officer to make findings consistent with the decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Chris Cowan
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge